No. 02-1028

IN THE

Supreme Court of the United States

NORFOLK SOUTHERN RAILWAY COMPANY,
Petitioner,

v.

JAMES N. KIRBY PTY LTD D/B/A KIRBY ENGINEERING, MMI GENERAL INSURANCE, LTD.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

SUPPLEMENTAL BRIEF OF PETITIONER

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SUPPLEMENTAL BRIEF

At the invitation of this Court, the Solicitor General has filed a brief on behalf of the United States recommending that the Court grant the petition on both questions presented. U.S. Br. 1. The Government has agreed with petitioner that genuine conflicts of authority exist as to both questions, *id.* at 7-9, and that the conflicts "create serious practical problems for shippers and carriers," *id.* at 9. As the Government notes, international trade cannot flow efficiently without certainty as to which party bears the risk of loss. *Id.* Under the auspices of COGSA, an efficient system has evolved where ocean and inland carriers transport cargo at low rates and with low transaction costs in reliance on the enforceability of standard limitation-of-liability clauses in a through bill of lading against all persons with interests in the property; cargo owners are responsible for insuring against the risk of loss above the contractual amount. Although developments in international trade, particularly the container revolution, "have made third-party enforcement of Himalaya Clauses critically important in international ocean shipping," *id.* at 9, the Eleventh Circuit has now issued rulings that make the vessel carrier's bill of lading unenforceable against cargo owners (by both vessel carriers and inland carriers), and the liability limitations of the standard *multimodal* bill of lading used in international trade unenforceable by inland carriers. Because certainty is critical in this area of the law, because carriers cannot feasibly contract around the Eleventh Circuit decision, *id.* at 14-15, because a carrier's liability should not vary as cargo crosses the jurisdictional lines of the various circuits, and because the decision below was clearly wrong, *id.* at 16-20, the Government properly urges this Court to grant certiorari.

Respondents have filed a supplemental brief in reply to the United States. Much of that brief does not warrant any response because it does not rebut the Government's reasons for granting the petition; instead, it attempts to avoid review

by rehearsing its merits arguments. Nonetheless, there are a few points that warrant a brief response.

1. There are many complex issues surrounding international transportation contracts. The Government has carefully analyzed issues that sometimes arise regarding such contracts, and correctly concluded that none of those issues affects this Court's review of the case. U.S. Br. 11-13. Indeed, the virtue of this case as a vehicle of review is that all such subsidiary issues are swept away because, by joint request of the parties, the district court certified the questions presented as "controlling question[s] of law" under 28 U.S.C. § 1292(b) to obviate the need for trial of any other issues.

a. The Carmack Amendment, when it applies, imposes requirements upon railroads that seek to limit their liability to shippers. U.S. Br. 11. As the Government notes, there is no Carmack issue in this case. The Carmack Amendment does not apply at all to contract transportation, such as occurred here, and most multimodal container traffic is contract transportation exempt from Carmack. U.S. Br. 12; 49 U.S.C. § 10709(b). Furthermore, where it applies, the Carmack Amendment provides an exclusive cause of action for a person causing loss or damage of property by a rail carrier and preempts state law. *Id.* § 11706(d); *Adams Express Co.* v. *Croninger*, 226 U.S. 491, 505-06 (1913). Respondents never asserted a federal Carmack claim in their complaint; instead, they asserted "state law causes of action" for negligence, recklessness, bailment and breach of contract. Pet. App. 37a.

Respondents weakly suggest that they could still raise a Carmack issue and were not bound "to raise every possible issue on an interlocutory appeal." Resp. Supp. Br. 9 n.11. That is not so. If respondents had had any good-faith arguments that the Carmack Amendment precluded enforcement of the liability limitations in this case, then the questions presented could not have been certified by the district court as "controlling question[s]" the resolution of which "may materially advance the ultimate termination of the litigation." 28

U.S.C. § 1292(b). Indeed, in urging the Eleventh Circuit to grant a permissive appeal of the certified order, respondents represented that the issue of Norfolk Southern's rights under the Himalaya Clauses was not only controlling but "the one question of law that really matters in the future conduct of this litigation," and thus "[i]f the district court's order is upheld on appeal, the case will undoubtedly settle for the limitation amount and no trial will be held." Resp. C.A. Pet. 10. In any event, respondents do not dispute the Government's point that they have waived any reliance on the Carmack Amendment in this Court because they never raised it in their brief in opposition. U.S. Br. 12; Sup. Ct. R. 15.2.

If anything, the Carmack Amendment underscores the broad importance of resolving the first question presented. The Carmack Amendment, where it applies, authorizes a rail carrier to limit its liability "to a value established by written declaration of the shipper or by a written agreement between the shipper and the carrier." 49 U.S.C. § 11706(c)(3)(A). For those international container shipments subject to the Carmack Amendment, the "shipper" purchasing rail services will be the vessel carrier or the freight forwarder. If the shipper cannot bind the cargo owner in this transaction – and it cannot under the Eleventh Circuit's rule – then the statutory liability-limitation provisions of the Carmack Amendment are ineffective. The decision below upsets basic principles of carrier law that are vital to the enforcement of federal statutory law governing both inland and ocean carriers. See also Pet. 26 (discussing effect on COGSA).

b. The Government also correctly notes that the Eleventh Circuit decided this case on the basis of federal law; that the applicability of federal law was undisputed below; and that respondents affirmatively represented to both the district court and the court of appeals that federal law applied. U.S. Br. 13. Indeed, respondents argued that petitioner's liability "must be determined" by the federal caselaw following *Robert C. Herd & Co.* v. *Krawill Machinery Corp.*, 359 U.S. 297

(1958), Resp. C.A. Br. 46, and that this case implicated a "well-established conflict in authority between two of the leading maritime circuits" on the application of the *Herd* rule to Himalaya clauses of this kind. Resp. C.A. Pet. 12-13. Respondents even told the Eleventh Circuit that in resolving the conflict "it must choose between two competing lines of jurisprudence arising under the Carriage of Goods By Sea Act" and "should be guided by which approach better promotes national and international uniformity." Resp. C.A. Br. 46.

Now, for the first time ever in the case, respondents assert that "Australian law undoubtedly governs the interpretation of the ICC bill of lading," Resp. Supp. Br. 1 n.1, and not *Herd* and the other federal precedents upon which respondents relied in securing victory below. As the Government points out, respondents have waived any such claim in this Court because they did not raise it in their brief in opposition. U.S. Br. 13; Sup. Ct. R. 15.2. Moreover, as the Government further notes, respondents also waived any such claim below by not raising it in either the district court or the court of appeals; indeed, they not only waived this argument, but they are judicially estopped from asserting it by their affirmative positions to the contrary. Respondents never claimed Australian law applied (as they admit, Resp. Supp. Br. 10), and indeed never submitted the required proof of Australian law. *The Scotland*, 105 U.S. 24, 29 (1881) (applying federal maritime law in the absence of proof of foreign law because the latter is not subject to judicial notice). Even now, respondents disavow any conflict between federal and Australian law, which would have been the only colorable reason even to consider foreign law. Resp. Supp. Br. 10.

Moreover, respondents would not have prevailed even if they had attempted to argue foreign law. They do not and cannot cite a single case holding that an international through bill of lading for transportation of goods to the United States, in which the mandatory terms of COGSA are incorporated, is governed by foreign law even if the bill was executed abroad.

By contrast, the leading courts of appeals decisions hold that the terms of those bills of lading (including Himalaya Clauses) are governed by federal law because of the incorporation of COGSA. *Wemhoener Pressen* v. *Ceres Marine Terminals, Inc.*, 5 F.3d 734, 741 (4th Cir. 1993) (citing cases). Indeed, this Court has long held that all bills of lading for interstate transportation are governed by federal common law, *Cincinnati, New Orleans, & Tex. Pac. Ry.* v. *Rankin*, 241 U.S. 319, 326-27 (1916), regardless of where the bill was issued, and respondents marshal no support for their claim that a different rule applies to foreign commerce.[1]

The critical point is that the Eleventh Circuit (at respondents' urging) decided these issues under federal law. As the Government indicates, this Court is entitled to decide the case

[1] Although the untimely and cursory conflict of laws analysis that respondents undertake (Resp. Supp. Br. 1 n.1) is irrelevant, it is also flawed. Respondents cite only a Georgia case applying the rule of *lex loci contractus* to a domestic employment contract, *Convergys Corp.* v. *Keener*, 582 S.E.2d 84, 86 (Ga. 2003). They simply ignore this Court's holding in *Rankin* that interstate bills of lading are governed by federal law, regardless of where the bill was issued, and all the governing case law as to the effect of COGSA on international bills of lading for shipment into the United States. The central feature of COGSA is that it operates by imposition of "compulsory terms" in every bill of lading for shipment to and from the United States. G. Gilmore & C. Black, Jr., *The Law of Admiralty* § 3-38, at 172 (2d ed. 1975). Thus, on the agency issue, for example, if a bill of lading governed by COGSA and issued to a freight forwarder were unenforceable against the cargo owner, the federal statute would be frustrated because the mandatory statutory liability limitations would be nullified. Federal law governs to prevent "'material prejudice to the characteristic features of the general maritime law or interfere[nce] with the proper harmony and uniformity of that law in its international and interstate relations.'" *Am. Dredging Co.* v. *Miller*, 510 U.S. 443, 447 (1994) (quoting *S. Pac. Co.* v. *Jensen*, 244 U.S. 205, 216 (1917)). There can be no doubt that federal policy requires application of federal law. *See* U.S. Br. 13 (discussing factors). Furthermore, because "Congress authorized shippers and carriers to place all of their dealings under COGSA, if they so intend," federal law pervades international shipping contracts, and governs the interpretation of those bills, including Himalaya Clauses extending COGSA liability limitations inland. *Wemhoener*, 5 F.3d at 741.

on that basis without taking a position on *post-hoc* choice-of-law arguments that were never raised below. U.S. Br. 13. There can be no dispute about the broad importance of uniform federal law on the enforceability and interpretation of bills of lading for interstate and foreign transportation, *see Rankin*, 241 U.S. at 326-27 (federal common law applies to interstate bills of lading); *Herd*, 359 U.S. at 300, 305-08 (applying federal "common law as declared by this Court" to Himalaya clause of ocean bill of lading for foreign transport); 49 U.S.C. § 80101 *et seq.* (Bill of Lading Act), and no reasonable argument that federal law does not apply to bills of lading for foreign shipments into the United States by operation of COGSA, *Wemhoener*, 5 F.3d at 741. For all the reasons stated in the petition and the Government's brief, it is imperative that this Court resolve the federal questions presented.

c. Respondents persist in arguing that the UNCITRAL negotiations are a reason to delay review, notwithstanding the State Department's position that those negotiations "are not likely to resolve" the questions presented. U.S. Br. 11 n.3. If anything, the UNCITRAL negotiations provide further reason for this Court to resolve these questions now. The draft instrument proposed by the United States provides that "the liability of an inland carrier (e.g., a truck or railroad) should be based on existing law." *Transport Law: Preparation of a Draft Instrument on Carriage of Goods [by Sea]; Proposal by the United States of America* ¶ 7, U.N. GAOR, 12th Sess., U.N. Doc. A/CN.9/W.G.III/WP.34 (2003). The U.S. proposal further clarifies that "[p]reserving the status quo in this regard would, of course, preserve whatever rights an inland performing party may have under applicable national law to rely on a Himalaya Clause to claim the benefit of the contracting carrier's rights under the Instrument." *Id.* Because existing law is maintained under the U.S. proposal, it would advance the UNCITRAL negotiations, and subsequent congressional consideration of the convention, for this Court to clarify existing law.

2. The Government agrees with petitioner that the conflicts of authority identified in the petition are genuine. Respondents implausibly argue that each of the many cases in conflict with the Eleventh Circuit are strictly limited to their facts, or that the courts on the other side of the conflict are "confused about subcontracting" in international trade. Resp. Supp. Br. 3-4, 6 n.8. The cases speak for themselves and set forth clear legal rules contrary to the rule adopted below, and petitioner will not here repeat the analysis already set forth in the briefs explaining those conflicts. Pet. 14-29; Reply Br. 2-5, 8-10; U.S. Br. 7-9.

But this Court should be clear that neither the Government nor petitioner asks this Court to "override the contractual decision by Kirby and ICC" to have ICC "serve as 'principal' in the transaction," Resp. Supp. Br. 1. Neither the Government nor petitioner has ever disputed – because the ICC bill of lading is plain on its face – that as a matter of contract ICC "assume[d] liability for the performance of the multimodal transport contract as a carrier." Pet. App. 54a. But that is true of all nonvessel carriers that assume responsibility for the goods and contract with actual vessel carriers to transport them. As the Government notes, the settled law prior to the decision below was that the primary carrier (regardless of the duties it assumes vis-à-vis the cargo owner) is deemed in law to act as an agent for the cargo owner in placing the cargo with secondary carriers. U.S. Br. 7; Reply Br. 2-5; *Chi., Milwaukee, St. Paul & Pac. R.R.* v. *Acme Fast Freight, Inc.*, 336 U.S. 465, 487 n.27 (1949) (noting that even where the shipper contracts with a freight forwarder to carry its goods, "the shipper is the undisclosed principal of its agent, the forwarder, in the latter's contract with the carrier"); *Nippon Fire & Marine Ins. Co.* v. *Skyway Freight Sys., Inc.*, 235 F.3d 53, 61 (2d Cir. 2000). It is telling that respondents cannot find a single case that agrees with the Eleventh Circuit.[2]

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[2] Respondents falsely accuse the Government of "gravely distort[ing] the record," Resp. Supp. Br. 2, in this and other cases when it says that

Respondents mischaracterize the Government's brief as "conced[ing] that the record here creates a poor vehicle to resolve generally applicable agency issues." Resp. Supp. Br. 3 n.3. It does no such thing. To the contrary, the Government recommends certiorari on both questions; it simply believes that it is unnecessary to reach the first question because the Eleventh Circuit's error on the second question is so patent. U.S. Br. 17-18 (noting that the Eleventh Circuit's application of complicated rules of contract construction "to override the plain terms of a Himalaya Clause is inconsistent with *Herd* and fosters harmful uncertainty in the industry"). But if the case is not resolved on this basis, the Government advises this Court that "it would be appropriate to consider petitioner's ability to enforce the liability limitation in the Hamburg Süd/ICC Bill, which is incorporated into petitioner's carriage agreement." *Id.* at 18.[3] The Government points out that under *Great Northern Railway* v. *O'Connor*, 232 U.S. 508 (1914), "when a carrier accepts goods for transport from an

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this is the rule unless the contrary is established by "the governing contract and the surrounding circumstances," U.S. Br. 7. The Government is raising the possibility that a cargo owner could theoretically contract to forbid the primary carrier from entering into contracts with downstream carriers that bind the cargo owner. But that is not the norm in freight forwarder contracting, and was certainly not the case here, given that the contracts expressly authorize the carriers to engage others to perform all or part of the contract of carriage. Pet. 6-9.

[3] It is absurd (and contrary to the record) for respondents to suggest that "Norfolk Southern did not contract with Hamburg Süd," the ocean carrier, simply because the nominal purchaser of rail services was Columbus Line USA Inc. Resp. Supp. Br. 1 n.2. The bill of lading specifically identifies Columbus Line as "the trade name used by Hamburg Südamerikanische ...." Pet. App. 68a. Respondents' complaints about the record (Supp. Br. 9) are ironic since there was never any dispute below that the Hamburg Süd bill was incorporated into Hamburg Süd's contract with petitioner. Indeed, respondents conceded below that "[t]he Hamburg Süd bill of lading may have been 'the one which [Norfolk Southern] contracted and performed under,' as the district court suggested," and instead argued only that the cargo owner could not be bound because it "was not a party to that contract." Resp. C.A. Br. 24 (alterations in original).

intermediary, the liability limitations in the carrier's terms of carriage are enforceable against the cargo owner regardless of whether the intermediary contracted with the carrier 'as agent [of the cargo owner] or Forwarder.'" U.S. Br. 18 (alteration in original) (quoting 232 U.S. at 514). This Court's precedent is controlling on the first question presented, the Government argues, without any final determination of the circumstances in which nonvessel carrier is an agent or principal, which in its view as a general matter implicates analysis of the Shipping Act. *Id.* at 19-20. Thus, contrary to respondents claims, the Government believes all "the conflicts are presented in this case," *id.* at 11, and this case is the proper vehicle to resolve them.[4]

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[4] Petitioner agrees with the Government that this case can be resolved on the basis of *Great Northern* without any resort to analysis of the Shipping Act (which is not directly at issue). But, to the extent the Shipping Act would be considered, this Court should be clear that there is no uncertainty whatever in the record below as to whether ICC meets the substantive definition in the Shipping Act of a "non-vessel operating common carrier" (or NVOCC) as "a common carrier that does not operate the vessels by which the ocean transportation is provided, and is a shipper in its relationship with an ocean common carrier." 46 U.S.C. app. § 1702(17)(B). It is undisputed that ICC "assume[d] responsibility for the transportation from the port or point of receipt to the port or point of destination," *id.* § 1702(6)(A) (definition of common carrier); the bill of lading ICC issued expressly provides that it "undertakes to perform and/or in his own name to procure the performance of the entire transport from, the place at which the goods are taken in charge ... to the place of delivery," and assumed "responsibility ... for the goods ... from the time the Freight Forwarder has taken the goods in his charge to the time of their delivery." Pet. App. 55a-56a (FBL ¶¶ 2.1(a), 6.1). It is also undisputed that ICC did not operate the vessel performing the transportation; its bill of lading expressly designates Hamburg-Süd's Queensland Star as the ocean vessel. Pet. 6. Finally, it is undisputed that ICC itself was the "shipper in its relationship with an ocean common carrier," 46 U.S.C. app. § 1702(17)(B), for it was expressly named as the "'shipper/exporter'" on the Hamburg Süd bill. Pet. 8; Pet. App. 9a. Petitioner never contested that ICC was substantively an NVOCC; it argued instead that respondents could not claim such status for ICC since ICC was not licensed as an NVOCC, an argument rejected below and now abandoned by petitioner. Reply Br. 5

3. The Federal Maritime Commission, the Maritime Administration, and the Surface Transportation Board have all come forward to urge review because the decision below, and the conflicts it engenders, "create serious practical problems for shippers and carriers," who cannot contract around the decision. U.S. Br. 9, 14-15. Respondents cavalierly assert that all inland carriers should demand indemnity from ocean carriers, but that begs the question why this Court should allow the aberrant ruling below to force a sea change in commercial relationships that does nothing but preserve an unjustified windfall for marine insurance companies. Pet. 22. Furthermore, not all inland carriers (such as small truckers) have the leverage to demand indemnity from ocean carriers, and, even if they did, that would simply shift the risk of judgments exceeding the $500 per-package liability limitation to ocean carriers, which would subvert the entire purpose of COGSA. As the Government recognizes, "[i]f contract limitations on carrier liability were not enforceable against cargo owners, then the availability of reduced transport rates as a *quid pro quo* for limited carrier liability would be put at risk." U.S. Br. 19. This Court should grant review of an unprecedented decision that undermines settled law, commercial expectations, and federal policy.

CONCLUSION

The petition for writ of certiorari should be granted.

n.4. Respondents by contrast *affirmatively* claimed that NVOCC was simply the name that "Congress has preferred" to describe freight forwarders like ICC. Resp. C.A. Br. 6. Indeed, respondents claimed that cases dealing with NVOCCs were "dispositive" of this case, *id.* at 29. *See id.* at 27 (arguing that *Hale Container Line, Inc.* v. *Houston Sea Packing Co.*, 137 F.3d 1455 (11th Cir. 1998) applied because there "an NVOCC (much like ICC Ltd.) issued a bill of lading with a Himalaya clause covering its agents, servants, and independent contractors"); *id.* at 42 (arguing that *Prebena Wire Bending Mach. Co.* v. *Transit Worldwide Corp.*, 1999 AMC 2623 (S.D.N.Y. 1999) applied because there a "shipper (much like Kirby) contracted with an NVOCC (much like ICC Ltd.), which in turn contracted with an ocean carrier (much like Hamburg Süd)").

Respectfully submitted,

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